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NO. 94-987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

WMX TECHNOLOGIES, INC., WMI
WASTE MANAGEMENT OF CANADA, INC.,
WASTE MANAGEMENT OF MICHIGAN, INC.,
Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, and AUTO-OWNERS INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENT AUTO-OWNERS INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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19 pp

COUNTER-STATEMENT OF QUESTION PRESENTED:

Whether the Supreme Court of New Jersey correctly determined that New Jersey did not have personal jurisdiction over a Michigan insurer with no minimum contacts with New Jersey, regarding a dispute with Michigan insureds as to insurance coverage for claims relating solely to Michigan landfills, and with no contractual provisions of the insurance policy implicating an appreciable interest of the State of New Jersey?

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTION PRESENTED i

STATEMENT OF FACTS 1

LEGAL ARGUMENTS 4

POINT I: PETITIONERS COULD NOT PREVAIL ON THE MERITS OF THE APPEAL UNDER THE PROPOSED "INTEREST NEXUS" TEST BECAUSE NEW JERSEY HAS NO INTEREST IN THE AUTO-OWNERS CONTRACTS 4

POINT II: CONTROLLING PRECEDENT FROM THIS COURT RULES OUT MERIT TO PETITIONERS' POSITION. 6

POINT III: PETITIONERS' CERTIORARI PETITION EXAGGERATES THE EXTENT OF CONFLICT IN LOWER COURT DECISIONS.. 9

POINT IV: THE OTHER SUGGESTED REASONS FOR CERTIORARI ARE ALSO LACKING IN MERIT. 12

CONCLUSION AND RELIEF REQUESTED 13

TABLE OF AUTHORITIES

CASES

Allstate Ins Co v. Hayes, 442 Mich 56, 67 n 11; 499 NW2d 743, 748 n 11 (1993) 3

Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D. N.Y., 1992) 4-6

Batton v. Tennessee Farmers Mutual Insurance Co., 153 Ariz. 268; 736 P.2d 2 (1987) 11

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478; 105 S. Ct. 2174; 85 L. Ed. 2d 528 (1985) 6-8, 12, 13

Davis v. American Family Mutual Insurance Co, 861 F2d 1159 (9th Cir, 1988) 9

Farmers Insurance Exchange v. Portage LaPrarie Ins Co., 907 F.2d 911, 914 (9th Cir., 1990) 9

General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 US 1369; 99 S Ct 35; 58 L Ed 2d 63 (1978) . . 12, 13

Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 417, 418; 104 S. Ct. 1868; 80 L. Ed. 2d 404 (1984) . . . 8

Hunt v. Erie Insurance Group, 728 F.2d 1244 (9th Cir., 1984) 9-11

Insurance Corp of Ireland, Ltd v. Compagnie Des Bauxites De Guinea, 456 US 694, 702 n 10; 102 S Ct 2099; 72 L Ed 2d 492 (1982) 12

Meyer v. Auto Club Insurance Association, 492 So2d 1314 (Fla, 1986) 11

Payne v. Motorist Mutual Insurance Company, 4 F.3d 452 (6th Cir., 1993) 10

Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir., 1980) 10

Rambo v. American Southern Insurance Co., 839 F.2d 1415, 1419-20 (10th Cir., 1988) 10

Ray v. Liberty Mutual Insurance Company, 974 F2d 754, 768-769 (6th Cir, 1992) 5

Rossman v. State Farm Mutual Automobile Insurance Co., 832 F.2d 282, 287 (4th Cir., 1987) 10

Rush v. Savchuk, 444 U.S. 320, 329-330; 100 S. Ct. 571; 62 L. Ed. 2d 516 (1980) 7, 8

Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) 8

Travelers Indemnity Co. v. Calvert Fire Insurance Co., 798 F.2d 826 (5th Cir., 1986), on rehearing in part, 836 F.2d 850 (5th Cir., 1988) 10, 11

STATEMENT OF FACTS

Respondent Auto-Owners Insurance Company[1] was a party to an appeal before the New Jersey Supreme Court (Docket No. 36,304) that was consolidated with the appeal of four Canadian insurers. (Docket No. 36,331). Petitioners have filed a Petition for Writ of Certiorari to the New Jersey Supreme Court. This brief is submitted by Auto-Owners in opposition.

The factual background of this case that has been presented to the Court by petitioners is incomplete. Auto-Owners Insurance Company is a Michigan insurer located in Lansing, Michigan. It is not licensed to do business and does not issue policies to New Jersey insureds. The policies sued on in New Jersey were issued in Michigan to Michigan waste disposal businesses.

At the time suit was filed in New Jersey, Waste Management of Michigan, Inc., the successor of three of Auto-Owners' insureds, was named as one of the plaintiffs. The common factual features of those insureds are that each was a waste hauler with potential responsibility for costs of cleanup of three Michigan landfills. One of the landfills was in Grand Rapids, Michigan. Another was in Kalamazoo, Michigan. The third was in Metamora, Michigan. None were in New Jersey.

Thus, the dispute with Auto Owners brought to New Jersey involved Michigan insureds, a Michigan insurer, a Michigan insurance contract, legal liability arising out of Michigan landfills, and most importantly, no issue

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[1] Auto-Owners has no parent company and only wholly-owned subsidiaries. Thus there are no other corporate entities listed pursuant to Rule 29.1.

whatsoever with regard to whether the "territory of coverage" clause provides or does not provide insurance coverage for a claim. Indeed, there is no factual claim that the "territory of coverage" clause is germane to this litigation in providing petitioners with coverage, nor does Auto-Owners claim that the territory of coverage clause divests the petitioners of insurance coverage.

Thus, the ultimate issue is precisely this: Whether an inchoate contractual provision, standing alone, provides a basis for personal jurisdiction? The New Jersey Supreme Court determined that it did not, because of the absence of any forum related event that pertains to the respondents.

The structure of this litigation bears some comment. There are two categories of insurance policies involved. One group of insurers insured a parent corporation, Waste Management, Inc., now known as WMX Technologies, Inc., for all of its operations and subsidiaries. Another group of insurers, including Auto-Owners, insured local waste disposal companies acquired by subsidiaries of Waste Management. One of those subsidiaries is Waste Management of Michigan, Inc. It acquired Industrial Waste Disposal of Kalamazoo, Michigan, and Gateway Sanitation Service of Almont, Michigan, and other Michigan waste haulers. Typically, after acquisition, policies that had been issued by Auto-Owners were canceled and coverages were placed under the insurance program policies of Waste Management.

In this litigation, not all of the parties who were previously insureds under the policies of Auto-Owners have been made parties to the litigation as plaintiffs. Nor have tort claimants or claimants asserting rights of contribution been added to this litigation. As a result, this litigation is not a comprehensive suit that would determine the rights and

obligations of all responsible parties at the landfills at issue, nor determine the rights and obligations of claimants. In the event Auto-Owners were to prevail on coverage by litigating in New Jersey, it would not have a judgment that would be binding on claimants in Michigan.[2]

Contrary to the suggestion of petitioners, this case is not being litigated as a "mass" case with a single controlling factual issue common to all parties. The New Jersey litigation has been fractionalized in two ways. One is with respect to lost policy discovery, which has involved Auto-Owners and is ongoing. The other fractionalization of the case is in terms of the landfill sites. The case has been severed into individual landfill sites, as if each were a separate suit. Twenty of the approximately 100 landfills at issue have been identified for "Phase I" discovery and trial. None of those twenty involve Auto-Owners or its insureds.[3]

Thus, while there might be state-by-state common questions of law, questions of fact are on a landfill-by-landfill basis, without predominating common questions of

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[2] *Allstate Ins. Co. v. Hayes*, 442 Mich. 56, 67 n. 11; 499 N.W.2d 743, 748 n. 11 (1993) ("Thus, if the insurer wishes to obtain a judgment that would bind the alleged tort victim, the insurer must make the victim a party to the action for declaratory judgment").

[3] However, under the first case management order, Auto-Owners was enjoined from litigating with Waste Management or its subsidiaries, whether or not they were parties to the present suit, with one exception. The suit that had been pending in Michigan at the time the New Jersey action was started, involving a Grand Rapids site, has proceeded to resolution. However, petitioners recently moved in the New Jersey trial court for leave to amend plaintiffs' complaint, to add a fourth landfill in Evart, Michigan that would involve Auto-Owners' interests. The Evart, Michigan landfill also would not be involved in "Phase I" of this litigation. Nor does it raise a forum-related event.

fact. Of most significance to this appeal, there is no question of fact or law common to Auto-Owners and a New Jersey plaintiff, insured, or landfill.

The New Jersey Supreme Court opinion is accurate in reciting the absence of a New Jersey forum related event (Petitioners Appendix, p 64-A) or any minimum contact of Auto-Owners with New Jersey. Auto-Owners submits that this case does not present a meritorious case for granting certiorari.

LEGAL ARGUMENTS

POINT I: PETITIONERS COULD NOT PREVAIL ON THE MERITS OF THE APPEAL UNDER THE PROPOSED "INTEREST NEXUS" TEST BECAUSE NEW JERSEY HAS NO INTEREST IN THE AUTO-OWNERS CONTRACTS.

The most important question is this: even assuming for a moment validity of petitioners' extreme "interest nexus" argument founded on *Ashley v. Abbott Laboratories*, 789 F. Supp. 552 (E.D. N.Y., 1992), is there a significant New Jersey interest in the Auto-Owners contracts? No New Jersey plaintiff is seeking recovery against an Auto-Owners' insured. No New Jersey plaintiff is seeking insurance coverage from Auto-Owners. No New Jersey landfill involves Auto-Owners. This is stressed to point out that petitioners' position goes beyond "territory nexus" or "interest nexus" to the "no nexus" realm.

Unless this Court is prepared to go so far as to rule that a state with no interest may assert personal jurisdiction, merely because of business convenience of a corporate

conglomerate, plaintiffs cannot prevail on this appeal. This is not a mass tort case. It is not a comprehensive case. It is an amalgamation of disparate cases having the same subject matter generally but not the same facts nor the same law to be applied.[4] Nor is this an area of law where there is no applicable substantive law to be applied,[5] but for New Jersey, to provide relief for New Jersey plaintiffs.

This case has these and other factual distinctions from the main case relied on by the petitioners, *Ashley v. Abbott Laboratories*, 789 F. Supp. 552 (E.D. N.Y., 1992). However, petitioners ignore the fact that if this Court were to replace a territory nexus test for minimum contacts with an interest nexus test, under *Ashley*, there would still have to be an interest of the State of New Jersey:

> "The Court must first determine if the forum state has an appreciable interest in the litigation, i.e., whether the litigation raises issues whose resolution would be affected by, or have a probable impact on the vindication

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[4] The concurring opinion of the New Jersey Supreme Court points out that any assumption that New Jersey law might apply to non-New Jersey landfills is ruled out by a decision of the New Jersey Supreme Court rendered after the filing of this suit. See Petitioners' Appendix, p. 79A, citing, *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n. Ins. Co.*, 134 N.J. 96, 629 A.2d 885 (1993). *Accord, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 105 S. Ct. 2965, 86 L. Ed.2d 688 (1985).

[5] See, e.g., *Ray v. Liberty Mutual Insurance Company*, 974 F.2d 754, 768-769 (6th Cir., 1992) (no insurance coverage for a generator of waste disposed of at the Metamora, Michigan landfill in light of the Michigan Supreme Court's construction of standard pollution exclusion in an insurance policy).

> of, policies expressed in the substantive, procedural or remedial laws of the forum. If there is an appreciable state interest, the assertion of jurisdiction is *prima facie* constitutional." 789 F. Supp. at 587.

What is New Jersey's interest in the contracts with Auto-Owners? Assume for a moment petitioners' worst-case scenario, implicit in petitioners' argument, that a Michigan judge would make an incorrect (inconsistent with New Jersey, thus to petitioners incorrect) ruling interpreting a Michigan contract between a Michigan insured and a Michigan insurer determining the rights of insurance with respect to a Michigan landfill. Or, assume the other argument in the petitioners' farragoes, that because they purchased a Michigan business holding a Michigan contract with a Michigan insurer, that petitioners are subjected to the "inefficiency" of having to litigate in Michigan where the witnesses and evidence are located. There is still no New Jersey state interest at stake, let alone the "appreciable state interest" required by *Ashley v. Abbott*. In short, petitioners' case is not meritorious under the most favorable lower court precedent they cite.

POINT II: CONTROLLING PRECEDENT FROM THIS COURT RULES OUT MERIT TO PETITIONERS' POSITION.

This Court has already addressed the question of whether a contract provision, standing alone, is sufficient to confer personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478; 105 S. Ct. 2174; 85 L. Ed. 2d

528 (1985): "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."

That question in *Burger King* is exactly this case. The "territory of coverage clause" is not germane to any issue in litigation in New Jersey. It is raised solely for personal jurisdiction reasons. But this Court emphasized in *Burger King* that a contract has to have a "substantial" connection to the forum state, 471 U.S. at 479. The territory clause which is not at issue for insurance coverage presents no substantial connection. It must be viewed, in the words of this Court, as a "random", "fortuitous", or "attenuated" connection that will not suffice for personal jurisdiction. Id.

Indeed, the threshold requirements for specific jurisdiction cannot be satisfied by an inchoate contractual provision, because not only must a defendant purposefully direct activities at residents of the forum for such jurisdiction to exist, but in addition, the forum litigation must arise out of or relate to those activities. *Burger King, supra*, 471 U.S. at 472. The central error of Waste Management is in ignoring the fact that the territory clause can never satisfy the second requirement, litigation arising from forum activities, where no accident occurred in the forum state.

Certainly *Burger King* is not a conceptual island. This Court has long held that personal jurisdiction cannot rest on non-germane matters. Even before *Burger King*, in *Rush v. Savchuk*, 444 U.S. 320, 329-330; 100 S. Ct. 571; 62 L. Ed. 2d 516 (1980), this Court had held that an insured could not be subjected to personal jurisdiction based upon an inchoate insurance contract providing coverage in a forum state. The *Rush* holding is fully consistent with the later holding in

Burger King. In *Rush*, it was pointed out: "In fact, the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is any contact in the *International Shoe* sense between Minnesota and the insured".[6]

Additionally, *Burger King* is conceptually consistent with *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 417, 418; 104 S. Ct. 1868; 80 L. Ed. 2d 404 (1984) ("We hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of *in personam* jurisdiction over a non-resident corporation in a cause of action not related to those purchase transactions"), (emphasis added), and, *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (even a corporate charter in Delaware is insufficient contact for personal jurisdiction in a non-Delaware cause of action).

Thus, petitioners' position lacks merit because personal jurisdiction cannot stand solely on a contractual matter that is not germane to events in the forum giving rise to the litigation. To rule in petitioners' favor, this Court would need to go to such lengths as to essentially eliminate personal jurisdiction as an issue. An insurance contract is not the only common example of inchoate rights in other states. Most people in our society have inchoate contractual rights to services in other states, even if they never exercise

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[6] While *Rush* involved personal jurisdiction of an insured, both an insured and an insurer are parties to the same contract. See also, *Sparkowich v. American Steamship Owners' Mutual Protection and Indemnity Ass'n., Inc.*, 687 F. Supp. 695, 698 (D. Me., 1988)("the language of *Rush* v. *Savchuk, supra*, establishes conclusively that, without more, an insurance obligation cannot be considered a jurisdictionally significant contact.")

those contractual rights. With a telephone comes a contractural right to place a call anywhere in the country. An automobile purchase carries with it a warranty contract for repairs at dealers across the country. A Visa card is advertised heavily as accepted all over the world.

Respectfully, to rule in petitioners' favor would require obliterating the cornerstones of personal jurisdiction law and dismantling the framework for state court limitations under due process.

POINT III: PETITIONERS' CERTIORARI PETITION EXAGGERATES THE EXTENT OF CONFLICT IN LOWER COURT DECISIONS.

There is no conflict in state and federal court decisions with respect to whether personal jurisdiction can be exercised based upon a territory of coverage clause in an insurance policy, in the absence of a forum accident. Petitioners are mis-citing cases with the distinguishable fact situation of a forum state accident (which then makes the territory of coverage clause germane to the litigation in the forum).

For example, in the Ninth Circuit, personal jurisdiction has been sustained where there has been an accident in the forum but not where there has been no forum state accident. Compare *Farmers Insurance Exchange v. Portage LaPrarie Ins. Co.*, 907 F.2d 911, 914 (9th Cir., 1990) ("Here, the forum was the site of the accident"), with, *Davis v. American Family Mutual Insurance Co.*, 861 F.2d 1159 (9th Cir., 1988) (Montana court did not have personal jurisdiction over out-of-state insurer for accident in the state of North Dakota), and *Hunt v. Erie Insurance Group*, 728

F.2d 1244 (9th Cir., 1984)[7] (California court did not have personal jurisdiction over east coast insurer for injuries sustained in Colorado accident). But cf., *Payne v. Motorist Mutual Insurance Company*, 4 F.3d 452 (6th Cir., 1993) (Where accident occurred in Tennessee, Tennessee court could exercise personal jurisdiction over Ohio insurer); *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282, 287 (4th Cir., 1987) (Virginia court could exercise personal jurisdiction over insurer for Virginia accident); *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir., 1980) (Where the accident was in Puerto Rico waters, Puerto Rico court could exercise personal jurisdiction over insurer). These cases are readily reconcilable, and they turn on the factual distinction of the presence or absence of a forum state accident.

Other similar cases reflecting this factual distinction, and consistently finding due process does not permit the exercise of jurisdiction over an out-of-state insurer in the absence of a forum state accident are *Rambo v. American Southern Insurance Co.*, 839 F.2d 1415, 1419-20 (10th Cir., 1988) (Distinguishing cases where insurer has solicited business in forum or accident occurred in forum), and *Travelers Indemnity Co. v. Calvert Fire Insurance Co.*, 798 F.2d 826 (5th Cir., 1986), on rehearing in part, 836 F.2d 850

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[7] In *Hunt*, the Ninth Circuit also rejected the circular argument now made by Waste Management that the territory clause itself is injection into the forum. 725 F.2d at 1246-1247. *Hunt* held the territory clause could not "fairly be characterized as an act by which Erie (the insurer) had purposefully availed itself of the privilege of conducting activities in California", where the accident did not occur in California. The plaintiff's unilateral decision to move to California after the accident (analogous to Waste Management's subsidiaries acquiring Auto-Owners' named insureds, all Michigan entities, after issuance of the policies) was held to be an insufficient basis to say that the insurer had purposefully availed itself of the forum state's laws and protections.

(5th Cir., 1988). As in *Hunt*, the *Travelers* court emphasized that the accident did not occur in the forum and distinguished other cases finding personal jurisdiction on that basis:

> "[T]hese cases are properly distinguishable. Of most significance, each involves a suit based on an accident occurring within the forum jurisdiction, an important factor tending to support specific jurisdiction." 798 F.2d at 833.

The actual split of authority that exists is not directly related to this case. There are two decisions of state supreme courts that suggest personal jurisdiction would not exist over an out-of-state insurer even if there was an accident within the forum. One of those is *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268; 736 P.2d 2 (1987). The other in *Meyer v. Auto Club Insurance Association*, 492 So.2d 1314 (Fla., 1986). Both involved an accident that occurred in the forum, but, with no liability claim of a forum resident.[8] Thus they are distinguishable and are not directly on point.

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[8] Additionally, there is one decision of the Wisconsin intermediate appellate court to the same effect. See *Marsh v. Farm Bureau Mutual Ins. Co.*, 179 Wis.2d 42, 505 N.W.2d 162 (1993), holding that Wisconsin did not have personal jurisdiction of a suit by a Minnesota resident against an Iowa insurer. However, on reading this case cited by Petitioners, it is apparent that it is of limited importance. While there had been an accident in Wisconsin, the insurer had denied coverage and a defense because of late notice. The second suit was not by the Wisconsin resident involved in the Wisconsin accident, but rather was by the Minnesota resident, the insured, against the Iowa insurer. Thus it was a suit on the contract, only secondarily related to the auto accident, and the Wisconsin court found no personal jurisdiction.

It is respectfully submitted that certiorari is not merited to overrule isolated decisions that are distinguishable anyway, even if not in keeping with the otherwise consistent court decisions that turn on whether there is a forum state accident. The New Jersey Supreme Court decision is consistent with all of the other federal court decisions.

POINT IV: THE OTHER SUGGESTED REASONS FOR CERTIORARI ARE ALSO LACKING IN MERIT.

One other suggested ground for certiorari being granted is to "resolve confusion", assertedly as to whether personal jurisdiction is a personal liberty interest or a sovereignty interest. This relatively minor debate was reconciled previously by this Court's decision in *Insurance Corp. of Ireland, Ltd v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 702 n. 10; 102 S. Ct. 2099; 72 L. Ed. 2d 492 (1982), explaining that "the restriction on state sovereign power described in *World Wide Volkswagen*. . .must be seen as ultimately a function of the individual liberty interest preserved by the due process clause". *Accord, Burger King, supra*, 471 U.S. at 472 n. 13.

At various points in the Petition, it is suggested that the territory clause is a contractual agreement to submit to jurisdiction. This is a weak claim for two reasons. First, the territory clause does not so state, and it would have to be tortured to yield a confession of such meaning. Secondly, the argument is self-defeating for federal question purposes: if it is a contractual agreement of the parties, no federal constitutional issue exists. Obviously, the New Jersey Supreme Court implicitly found no such contractual agreement.

Finally, an indication of whether certiorari should be granted can be gleaned from *General Council on Finance*

and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1369; 99 S. Ct. 35; 58 L. Ed. 2d 63 (1978). In *General Council*, Justice Rehnquist, as Circuit Justice, denied a stay pending an application for certiorari. The basis for doing so was, "there is no indication that [the California lower court] failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari". 439 U.S. at 1374.

Here, the New Jersey Supreme Court has faithfully followed the precedent from the United States Supreme Court on personal jurisdiction. Six of the seven justices from the New Jersey Supreme Court have agreed that in the absence of a forum related event personal jurisdiction cannot rest on the territory of coverage clause, perfectly consistent with *Burger King, supra*, that a contractual provision cannot alone be the basis of personal jurisdiction. A seventh justice concurred, finding that the exercise of personal jurisdiction over respondents would offend traditional notions of fair play and substantial justice. Certainly there has been no failure to adhere to precedent from the United States Supreme Court. In short, this is not a case that merits certiorari, under *General Council, supra.*

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied. Petitioners cannot win on the most extreme theory advanced because New Jersey lacks an appreciable interest in the Auto-Owners contracts. The asserted split of authority has been exaggerated. The decision of the New Jersey Supreme Court correctly determined that no appellate court has sustained personal jurisdiction in the absence of a forum related event.

Respondent Auto-Owners Insurance Company requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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